

The Use Tax Act, 35 ILCS 105/1 et seq. (1996 State Bar Edition), imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. (This is a GIL.)

January 8, 1999

Dear Ms. Xxxxx:

This letter is in response to your letter dated December 10, 1998. The nature of your letter and the information you have provided require that we respond with a General Information Letter which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

Our hotel clients have begun to address the 'sale for resale' issue, and we would like to know the Department of Revenue's view on items for resale in the hotel industry. We have clients that relate to the generality of the information supplied in the following paragraphs and we would like to know the Department's current position.

Several states have been addressing the hotel industry and items sold for resale to their guests. Hotel owners purchase items (i.e. shampoos, soaps, etc.) as sales for resale to their customers. In addition, some hotels provide complimentary meals to customers. The customer takes title to the products, and the consideration is included in the cost of the room. Each room price (consideration) reflects the costs associated with the charge to the customer. In addition, each item (i.e. shampoo, soap, etc.) is replaced for each new customer, since the intention of the purchase is for the customer to use or take the product.

#### **State Law Interpretation**

Referring to Illinois Statute, Chapter 35 ILCS 120, guidelines qualifying sales for resale are: (1) tangible personal property in any form not purchased for retail, (2) for a valuable consideration, (3) in which title or ownership transfers to the customer, and (4) not for the purpose of use or consumption. An illustration would be:

The hotel purchases shampoo (tangible personal property), in which *title or ownership* transfers to the customer, for a valuable consideration (room charges), not for purpose of use or consumption.

The application of 'sale for resale' is currently applied in other Illinois industry groups (i.e. manufactures, retailers and restaurants). Shipping supplies can be purchased for resale when

title transfers to the customer as part of the sale. The same theory applies to the restaurant industry in their tax exempt purchase of supplies (napkins, straws, etc.) for resale. 'Nonreusable tangible personal property that is used by persons engaged in the business of operating a restaurant...is a sale for resale when it is transferred to customers in the ordinary course of business as a part of the sale of food or beverages...' (Retailers' Occupation Tax Act 120/1 Definitions).

The definition of a 'sale at retail' is 'transfer of ownership of or title to tangible personal property to a purchaser, for the *purpose* (emphasis added) of use or consumption, and not for the *purpose* (emphasis added) of resale in any form as tangible personal property...'. A 'sale at retail' shall also include the transfer of tangible personal property to a purchaser who transfers the property to another without valuable consideration, and including a transfer of tangible personal property with or without valuable consideration through unqualified resale compliance as stated in Section 2c of the ROT Act. Our hotel clients intended purpose of purchasing items such as shampoos, soaps, etc. is a sale for resale and not at retail.

The use tax defines 'use' as 'the exercise by any person of any right or power over tangible personal property incident to the ownership of that property...'. The hotel does not use the items transferred to their customers, since the customer exercises the right or power over the tangible personal property, and retains ownership to the tangible personal property when they take the items.

### **Other State Interpretations**

Through my compiled state research, I have concluded that many states are allowing the hotel industry to purchase the above mentioned items as a sale for resale. In Missouri, a recent decision *Drury Supply Co., et al. v. Director of Revenue* (MO AHC, No. 95-000870RV) addressed the issue of sale for resale. Other states that have addressed this issue are Indiana (Sales Tax Clarification 07/08/94 Item #S.10 Lodging Supplies), Arizona (Tax Ruling TPR 95-18), Kentucky (Revenue Circular 51C001-S5), California (*Embassy Suites, Inc.*), Colorado, Idaho, and Wyoming.

### **Illinois Court Decisions and Letter Rulings**

In Illinois General Information Letters St 94-0550 and ST 96-0362, the Department indicated that the items (shampoos, soaps, etc.) could not be purchased tax exempt because they are used in the ordinary course of business. I would agree that items such as office stationary and related 'used' items (i.e. fixed assets) would be subject to tax, but the items factored into the guest rooms are definitely not used by the hotel. Referring to the definition of 'use', the hotel must exercise right or power over the tangible personal property **incident** to the *ownership* of that property. Since the intention of purchasing the items (i.e. shampoo, soap, etc.) is the transfer of ownership to the

customer, the customer is ultimately the 'user' of the tangible personal property. Please refer to the above state information.

In Illinois Supreme Court decision, H. Kohnstamm & Co. v. Department of Revenue, et al. Sept 25, 1956, the court solely decided the issue based on title transfer. The Court said the sale for resale argument was nonexistent because customers never received the soap used in the cleaning of the shirts.

In Illinois Supreme Court decision, Robertson Products Co v. Nudelman, 389 Ill 281, the Court never addressed the issue of title transfer and the fact that hotels are a taxable service. Hotels are a 'taxable' service created by the taxing sections of the Hotel Operators' Occupation Tax Act, which is founded on the principal of ROT. In addition, I refer to the Court's interpretation, 'then in order to come within the exemption, there must be a resale in some form for a valuable consideration.' Also, the decision is generally interpreting the facts for both hotels and office buildings. There are two separate issues involved: (1) the hotels and (2) office buildings. The Court stated 'That no direct charge for these commodities is made...'. The State of Illinois does not require a direct charge in the 'sale for resale' theory applied in shipping **and** restaurants, yet the State has allowed it in those situations.

As a former state tax auditor, I can see the hotel industry's specific concern to changing interpretations. If you could provide some direction in the hotel application of the 'sale for resale' theory, our clients and I would truly appreciate it. If you should have questions, or need additional information please contact me at ####.

Illinois taxes the retail sale and use of tangible personal property under two separate but related statutes. The Retailers' Occupation Tax Act, 35 ILCS 120/1 et seq. (1996 State Bar Edition), imposes a tax upon gross receipts of persons engaged in the business of selling tangible personal property at retail. The Use Tax Act, 35 ILCS 105/1 et seq. (1996 State Bar Edition), imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer.

The term "gross receipts" is defined at 86 Ill. Adm. Code 130.401 as "all the consideration actually received by the seller, except traded-in tangible personal property." 86 Ill. Adm. Code 130.410 provides that "[i]n computing Retailers' Occupation Tax liability, no deductions shall be made by a taxpayer from gross receipts or selling prices on account of the cost of property sold, the cost of materials used, labor or service costs, freight or transportation costs, overhead costs, clerk hire or salesmen's commissions, interest paid by the seller, or any other expenses whatsoever."

In general, donors in Illinois owe Use Tax on the items of tangible personal property that they give away. Hotels in Illinois are donors of items of tangible personal property they purchase for the purpose of supplying to guests, including toiletry and food items, whether these are automatically placed into the guest

rooms or are available at the front desk or lobby area. As donors, hotels incur a Use Tax liability. Illinois registered vendors of hotel supply items incur Retailers' Occupation Tax liabilities upon sales and deliveries in Illinois, and they collect the corresponding Use Tax from their hotel customers. Hotels that purchase from unregistered out-of-State vendors must self-assess and pay the Use Tax directly to this Department. Hotels also incur a Use Tax liability upon items purchased for use in the guest rooms or other locations, such as furniture, dishes, cutlery, etc.

Please note that the Hotel Operators' Occupation Tax is imposed upon the occupation of renting, leasing or letting rooms in a hotel. See 35 ILCS 145/3. It is not a sales tax and is not imposed upon the occupation of selling tangible personal property. This tax is imposed in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision thereof. See 35 ILCS 145/1.

I hope this information is helpful. The Department of Revenue maintains a Web site which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis  
Associate Counsel

MAJ:msk  
Enc.